INFORMATION

FOR

GILBERT HALLADAY School-maſter in Weſter Anſtruther, PANNEL,

AGAINST

ROBERT ROBB Firſt Magiſtrate of the Burgh of Weſter Anſtruther, with Concourſe of his MAJESTY's Advocate, for his Majeſty's intereſt, Proſecutor.

THE pannel ſtands accuſed before your Lordſhips of having emitted a depoſition in a civil proceſs now depending before the court of ſeſſion, *affirming falſehoods judicially upon oath.* The ſpirit with which this proſecution is brought, will beſt appear from the following ſtate of facts.

The pannel, though originally bred a gardner in the ſervice of the Earl of Morton, had the good fortune to receive a very liberal education both at ſchool and colleges; and particularly, made more than uſual proficiency in the mathematics, which he ſtudied under Mr MacLaurin.

In 1743, he was prevailed on to go abroad in the ſervice of Colonel Douglas, brother of the Earl of Morton; but upon the death of that gentleman, who was killed at Fountenoy, he returned to this country; and, from 1744 to 1756, he taught a private ſchool of mathematics in Leith, with ſome degree of approbation.

In 1756, he received a call from the town-council and kirk-ſeſſion of Weſter Anſtruther, to teach their ſchool, which he has done ever ſince with unexceptionable character. He was indeed for ſeveral years kept out of the ſalary due to him, by reaſon of a difference which then ſubſiſted between the patron and the town; but in April 1764, all parties became ſo much convinced of his merit, that a new call was given to him, with the unanimous approbation and concurrence of the patron, the heritors, the miniſter and kirk-ſeſſion, the magiſtrates and council, and the managers of the charity-funds and ſocieties of the place. By all theſe different bodies, or delegates from them, was this new call ſigned, at a time when *no political diviſions* had taken place, and after eight years reſidence amongſt them :——A proof the moſt convincing of the ſenſe which every perſon then entertained of the propriety of his behaviour and fitneſs for the office in which they had placed him.

Sir John Anſtruther, Baronet, and Mr William Alexander merchant in Edinburgh, having taken the field as competitors for the Boroughs in the room of Sir Harry Erſkine, the pannel had the honour to be courted by both parties; and as it became in ſome meaſure neceſſary for every perſon in the boroughs, whether counſellor or not, to take a ſide, he will not diſown that he inclined to give any little aſſiſtance in his power to his patron Sir John Anſtruther. This drew upon him the odium and ill-will of the other party; and ſince that time, he has been perſecuted, tortured, and harraſſed by their agents and friends in a manner unprecedented, and ſhameful to be heard of.

It would be tedious to recite every act of wanton cruelty which they have practiſed from time to time againſt this poor man. Some few inſtances ſhall be mentioned.

In February 1766, he was adduced as a witneſs for the complainers, in a cauſe depending before the court of ſeſſion relative to reducing the elections of Weſter Anſtruther. It is well known, that the proof on the part of the reſpondents was conducted by Mr Alexander and his agents, who ſeldom allowed any witneſs againſt them to eſcape without objection; but they ſeem to have thought it more particularly material for them to caſt the evidence of this pannel; with which

which view, they gave in a paper of objections, conceived in terms of the moſt ſcurrilous abuſe, accuſing him at random as the moſt abandoned wretch, and moſt notorious criminal; and, among other things, applying to him a long and particular narrative of a fraud, which they pretended he had been guilty of when in the army; but which, it would appear, they had taken from a ſtory-book, where it is verbatim to be found.—Theſe objections having been reported to the court of ſeſſion, their Lordſhips were pleaſed to pronounce the following deliverance: "The Lord Ordinary having adviſed with the "Lords, finds the objection to Gabriel Halladay is injurious and ma- Feb. 19. 1766.
"licious, and appoints the ſame, with the anſwers thereto, and the con-
"ceſſion on this page, to be ſtruck out of the proceedings in this
"cauſe, and not to enter the record."

The next device fallen on, was to pick up any ſmall debts he happened to be owing, and ſome that he was *not owing*, upon which they harraſſed him with diligence.——During his reſidence in Leith, he had rented a houſe belonging to the incorporation of wrights and maſons; and as his circumſtances were not very opulent, they were in uſe to take bills from him for his houſe-rent, as a ſort of ſecurity in place of a cautioner. One of theſe bills, dated 1ſt October 1750, for L. 30 Scots, payable to William Thomſon the box-maſter, and his ſucceſſors in office, happened to ly in Thomſon's hands after the rent of that year was paid; and he poſſeſſed the houſe for ſix years thereafter, the rents of which were duly paid, as can be proved by a diſcharge of the laſt year's rent now in his poſſeſſion. The bill which he has mentioned never was thought of by him, till lately that Ellis Martin, one of Mr Alexander's chief agents, having made it his ſtudy to ranſack the whole town of Leith, in order, if poſſible, to pick up ſome debt againſt him, laid his hands on this Bill, and obtained a decreet upon it before the admiral-depute for the eaſt part of Fife, in the name of John Cooper preſent boxmaſter of the incorporation; upon which decreet horning and caption immediately followed, and the pannel was concuſſed into payment of the bill, intereſt, and expences, amounting to

L. 4

L. 4 : 17 : 6 Sterling, before he had time to take advice or to ſuſpend the charge.

Mr Alexander informed your Lordſhips in perſon, that he had never authoriſed the picking up debts due by the pannel. Certain it is, that the fact has been done by his agents, whoever authoriſed them. The pannel happened to be indebted to one Petrie at Leith in a ſmall ſum of 50 ſhillings. About the time of his examination, another of the agents, Mr Borthwick, made an attempt, though unſucceſsful, to purchaſe this debt, in order, as he ſaid, to proſecute Halladay. And a third agent, Mr Clapperton, has been extremely officious and clamorous in demanding payment of a debt due by the pannel to Brown a watchmaker, of which a ſmall balance only of about 18 ſhillings remains.

But, if Mr Alexander did not authoriſe the picking up of debts, the pannel would be glad to know, at whoſe inſtance he has for theſe twelve months paſt been led from one kirk-court to another; and who it was that ranſacked the records of the kirk-ſeſſion of Leith, in order to revive a fooliſh and groundleſs ſcandal againſt him, which had lain dormant ſince the year 1754.——A malicious information had been lodged againſt the pannel before the kirk-ſeſſion of Leith, accuſing him of having been found in bed with a married woman. The fact which came out in proof was, that he had lain down with his cloaths on in a bed where two women were lying; one witneſs ſaid, that he was under the bed-cloaths, another that he was above them, and that he did not ſeem to mean any harm. This was the whole affair. The proſecution was dropt. The kirk-ſeſſion of Leith never thought of it more. Twelve years were allowed to elapſe; but it was thought proper to revive it in the year 1766, in the name of this vigilant and public-ſpirited magiſtrate Bailie Robb, and an extract from the record of the kirk-ſeſſion of Leith was laid before the kirk-ſeſſion of Weſter Anſtruther for proof of the fact. The kirk-ſeſſion, after inquiring into the affair, diſmiſſed the complaint. An appeal was entered to the preſbytery; but *there* Mr Alexander has been equally unſucceſsful.

This proſecution before the church-courts he can have no difficulty of

of charging to Mr Alexander; but indeed it can hardly be imagined, that he alſo authoriſed or gave any countenance to his under-agents and friends, who were pleaſed to inſult the pannel's wife, and put her in fear of her life when at the down lying, merely becauſe her huſband was ſuppoſed to be of a different faction from Mr Alexander.

Laſt of all comes the preſent proſecution, raiſed *in the name of Bailie Robb*; but which the pannel does ſay, is inſtigated and carried on by *Mr William Alexander*, who appeared in court on the ſide of the proſecutor, and thereby ſeemed to ſtate himſelf as the *real party*, though the name of Bailie Robb is uſed in the criminal letters; and it can be proven, if denied, that Mr William Alexander is the perſon by whom the counſel are feed, and who is at the whole expence of the proſecution. To ſuppoſe indeed, that it was carried on by Bailie Robb from any deteſtation of the crime charged, or any view to public juſtice, would be abſurd. The purpoſes of the action are plainly two-fold, *1ſt*, To indulge the unrelenting ſpirit of thoſe who have hunted and perſecuted this poor man for theſe twelve months paſt; *2dly*, To have an indirect influence on the civil queſtion depending before another court. The pannel is ſorry that any magiſtrate ſhould have ſo proſtituted his office, as to give his name to ſo improper an action.

But indeed this is the leſs to be wondered at, that, from the proceedings in the other cauſe, it is plain that this ſame Bailie Robb is a mere tool of that party which he has eſpouſed, and that before the competition began he was in ſuch wretched circumſtances, that he had not a ſhirt to his back, and was in the common practice of borrowing ſixpences from his neighbours; whereas now he is one of the moſt opulent and flouriſhing men in the whole place; ſo that, if he has the inſolence to ſport with the juſtice of this ſupreme court, by giving his name to a proſecution calculated for no other purpoſe, but to ſerve a dirty political job, this was perhaps a favour which the real proſecutors were intitled to expect at his hand.

But let us now examine a little more particularly the nature of the action itſelf, and of the libel upon which it is to be tried. In the pleading on the relevancy, your Lordſhips heard a variety of objections

ſtated by counſel, and you were of opinion, that they merited conſideration; for which reaſon you appointed informations.

Objection 1. want of title.

The *firſt* objection offered, was to the title of Bailie Robb to carry on this proſecution, with concourſe only of his Majeſty's Advocate. The criminal law of this country knows no ſuch thing as the trial of a public crime, at the inſtance of any private individual not intereſted. The power of proſecution is lodged in his Majeſty's Advocate, and in his name, or under his authority, muſt every offender be brought to trial before your Lordſhips. If a private party appears, who has ſuſtained damage in his perſon, character, or goods, that perſon is intitled to proſecute in his own name with the concourſe of his Majeſty's Advocate, who is obliged, by the duty of his office, to give his nominal conſent or authority to the action; but, if there is no private party intereſted, or if none appears, the law does not admit of popular proſecutions. Your Lordſhips know well, that the power of bringing to trial is alone veſted in his Majeſty's Advocate.

The queſtion then is, What damage has Bailie Robb ſuſtained, or what intereſt has he in the queſtion, ſufficient to entitle him to aſſume the character of proſecutor in this trial, which it would ſeem his Majeſty's Advocate has diſclaimed, further than giving his official conſent, which in all caſes is given of courſe, and which does not ſupply the defect of title in the party? The pannel can ſee no intereſt that Bailie Robb has in the matter; for, from one end of the libel to the other, it is not ſaid, that the pannel ſwore falſehoods againſt Bailie Robb. He is indeed ſaid to have ſworn falſely in certain particulars reſpecting one Robert Peattie, and one Lieutenant Stewart, and two other perſons, called *Baillie Brown* and *Walter Thomſon*: But what is all this to Bailie Robb? It is not ſaid in the libel, that Bailie Robb has ſuffered any damage by the alledged falſe depoſition, or that he has any intereſt or concern in the matter. Nay, his name is not mentioned in any part of the libel, except in the beginning, where he is ſtated as the proſecutor; ſo that the proſecution is here brought by Bailie Robb, not as a perſon damaged by the falſe oath, but merely *tanquam quilibet e populo.* Had the criminal letters been in name of Robert Peattie, againſt whom the oath no doubt tends to fix the

crime

crime of bribery, the title might have poſſibly been conſidered as ſufficient; but Bailie Robb has no earthly concern in the matter.

It may be ſaid, that Bailie Robb has an indirect intereſt, in ſo far as he is a reſpondent in the civil complaint, and the oath of this pannel may aſſiſt in bringing about a total reduction of the elections. To this it is anſwered, 1*mo*, That no ſuch title or intereſt is qualified in the libel, and it cannot now be ſupplied; 2*do*, Suppoſing it had been qualified, it would have been inſufficient.

A remote poſſibility of a conſequential damage that may enſue or may not enſue, according to circumſtances, will not ſurely give any perſon a title to proſecute criminally before your Lordſhips. How does Bailie Robb know, or how can he make it appear to your Lordſhips, what will be the effect of this oath upon the deciſion of the civil cauſe? The import of the oath has not yet been determined; and it is premature in Bailie Robb to bring this proſecution before he is hurt. Poſſibly the court of ſeſſion may be of opinion, that the proof of bribery againſt Robert Peattie, or any other individuals of the council, will only ſet aſide the election of theſe individual counſellors, and will not have a general effect *quoad* the elections. The court may alſo be of opinion, upon judging of the whole evidence, that the election falls to be ſet aſide on other grounds; and that the oath of the pannel is totally inſignificant. Nay, it is a poſſible caſe, that the oath of this pannel, ſo far from hurting Bailie Robb, and the other reſpondents in that complaint, may be of ſervice to them. It is likeways poſſible, that the court of ſeſſion, in judging of that evidence, may be of opinion, that the pannel's oath is, in every article, ſupported, and put beyond doubt, by a variety of circumſtances, and chain of facts, which compoſe the volume of proof adduced *hinc inde* in the civil cauſe, but which it would not be eaſy to collect together in one ſederunt before a jury. The pannel does not mean to anticipate the judgment of that court, or to point out what may be the import of the whole evidence taken together. It is enough to ſay, that the oath which is brought here, as the *corpus delicti*, is ſtill *ſub judice* in the civil court; and whatever title Robert Peattie, or others who are accuſed in that oath, may have to complain, it is, in the nature of things,

things, impoſſible, that Bailie Robb, againſt whom not one ſyllable is uttered in the oath, can have the leaſt right, in the preſent ſtate of matters, to come before your Lordſhips, and ſay, that he has ſuſtained damage, and that he has an intereſt to proſecute the pannel for perjury.

To illuſtrate this argument, the pannel hopes he will be excuſed for appealing to the ideas of the Engliſh laws which have arrived at fully as great perfection as ours in criminal matters, and are more diſtinctly laid down in their law-books. The act 5th Elizabeth, chap. 5. § 6. ſays, "That if any perſon or perſons ſhall, either by "the ſubornation, unlawful procurement, ſiniſter perſuaſion, or means "of any other, or by their own act, conſent, or agreement, *wil-* "*fully and corruptly* commit any manner of *wilful* perjury, by his "or their depoſition, in any of the courts before mentioned, or "being examined *ad perpetuam rei memoriam;* that then every ſuch "offender, being duly convicted or attainted, ſhall forfeit L. 20, "and have impriſonment by the ſpace of ſix months, without bail "or main priſe," &c. And, § 8. ſays, "The one moiety of all which "ſums of money, goods, and chattles, to be forfeited in manner "and form aforeſaid, to be to the Queen our Sovereign Lady, her "heirs and ſucceſſors, and the other moiety to ſuch perſon or per- "ſons as ſhall be *grieved, hindered, or moleſted,* by reaſon of any the "offence or offences before mentioned, that will ſue for the ſame," &c. Hawkins, a very accurate writer, in obſerving upon this act, ſays, "That no falſe oath can be within the ſtatute, unleſs the "party againſt whom it was ſworn ſuffered ſome kind of *diſadvantage* "by it; for otherwiſe, it cannot be ſaid that any one was grieved, hin- "dered, or moleſted by it; and, therefore, it is certain, that in every "proſecution upon the ſtatute, it is neceſſary to ſet forth the *record* "*of the cauſe,* wherein the perjury complained of is ſuppoſed to have "been committed; and alſo to prove, at the trial of the cauſe, that "there is actually ſuch a record, *by producing the record itſelf,* or a "true copy thereof, which muſt agree with that which is ſet forth "in the pleadings, without any material variance; for otherwiſe, "it cannot legally appear that there ever was ſuch a ſuit depending,

Pleas of the crown, vol. 1. p. 81.

"where

" wherein the party might be prejudiced in the manner ſuppoſed:
" Alſo, it ſeems to be agreed that it is neceſſary, not only to ſet
" forth the point wherein the falſe oath was aſſigned, but alſo to
" ſhew *in what manner it conduced to the proof or diſproof* of the mat-
" ter in debate between the parties; and it hath been adjudged,
" That an indictment ſetting forth a ſuit concerning the manor of
" *Dale*, and aſſigning a falſe oath concerning the manor (*manerium*
" *prædictum innuendo*) is not good, becauſe it no otherwiſe appears
" that the falſe oath did concern the manor of Dale, but by the
" *innuendo*, which is not a ſufficient averment. Alſo, upon the ſame
" ground, it ſeems to be ſafeſt, in a proſecution upon the ſtatute
" for a falſe oath in chancery, to ſet forth *the bill and anſwer*, that
" the plaintiff may appear to have been *aggrieved by it*; and for
" the ſame reaſon, it ſeemeth alſo, that you ought, in ſuch a
" proſecution of a witneſs in chancery, to ſet forth the *interrogatory*
" in particular, and to ſhew *how it was material:* Alſo, it hath been
" reſolved, that as in an action upon the ſtatute brought by one perſon,
" it muſt appear, that the falſe oath was *prejudicial* to the plaintiff;
" ſo in an action by more than one, it muſt appear to have been
" prejudicial to every one of the plaintiffs: And it hath been ſaid, That
" it is not ſufficient to ſhew, that the falſe oath cauſed the court to
" make an award againſt the plaintiff, *unleſs it alſo appear that ſuch*
" *an award was prejudicial to him;* and therefore, when the plaintiff,
" at a trial in ejectment, challenged his juror, and proved his chal-
" lenge by a falſe oath, by reaſon whereof the inqueſt was not taken;
" and conſequently the poſſeſſion of the defendant, who had a de-
" feaſible title, continued longer than it otherwiſe would have done:
" It hath been adjudged, that ſuch a defendant cannot have an ac-
" tion on the ſtatute againſt ſuch witneſs; becauſe in truth he *gained*
" *an advantage* by the perjury."

Here it is plainly laid down, that the action in which the falſe oath is emitted, muſt be brought to an end, the record of it produced in the action afterwards brought for perjury, and evidence ſhown, not only that an award was given againſt the plaintiff in conſequence of the falſe oath, but that the award was prejudicial, or attended with

ſome actual damage to him. The application of this doctrine to the preſent caſe, is too obvious to require any argument.

Objection 2. No evidence of the title.

And this leads to a *ſecond* objection, which is, That, even if a damage had ariſen to Bailie Robb from this alledged falſe oath, the proper evidence of it is not before the court; and therefore the action cannot proceed.

From the above paſſage of Hawkins, it appears, that, in England, the record itſelf of the whole proceedings in the former action muſt be produced; and that even the interrogatories muſt be ſet forth on which the falſe oath was emitted. In another paſſage he ſays, "That "if, upon the whole circumſtances of the caſe, it ſhall appear pro- "bable, that it was rather owing to the weakneſs, than the perverſe- "neſs of the party, as where it was occaſioned by ſurpriſe or inad- "vertency, or *a miſtake in the true ſtate of the queſtion*, it cannot but "be hard to make it amount to voluntary and corrupt perjury." He further ſays, "It ſeemeth clear, that if the oath on which a man is "indicted of perjury, be wholly foreign from that purpoſe, or alto- "gether *immaterial*, and neither any way pertinent to the matter in "queſtion, not tending to aggravate or extenuate the damages, nor "likely to induce the jury to give a readier credit to the ſubſtantial "part of the evidence, it cannot amount to perjury; becauſe it is "merely idle and inſignificant."

Theſe obſervations are founded on common ſenſe; and it is impoſſible that any court or jury can have a fair opportunity of judging of the *import* of the oath, or how far it was *material to the point at iſſue*, or *attended with any damage* to the party complaining, unleſs the whole of the proceedings are before them, and even the very words of the interrogatories condeſcended on which were put to the witneſs. The proſecutor in this caſe has thought proper to lay a partial ſtate of theſe proceedings before the court; it was his duty to have brought the whole, not only by way of evidence to the jury, but in order to *inſtruct his title*, or, which is the ſame thing, *his intereſt*, to your Lordſhips, and to ſhow, by a fair examination of the whole proof, in what reſpect he has been aggrieved by the oath of this particular witneſs. In place of that, he has only tranſmitted

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into court one part of the record of the civil cauſe, *viz.* the oath of this pannel, without ſhowing the court what connection this oath has with the other proof and proceedings, what aid it receives from, or in what ſhape it is contradicted by the other proof, or, in ſhort, what tendency it has to hurt or affect the proſecutor in the ſmalleſt degree. Your Lordſhips do not even ſee that the proſecutor is a reſpondent, or has any concern in the complaint ſaid to be depending in the other court. The pannel is intitled to deny, that Bailie Robb has any concern in that proceſs. All that he knows of the matter is, that he was adduced as a witneſs to give evidence in a complaint ſaid to be depending at the inſtance of Robert Hunter, and others, againſt the magiſtrates and counſel of Weſter Anſtruther; but who are the real parties in that cauſe, he has no acceſs to know, except from hear-ſay. Nor have your Lordſhips any other evidence of it before you in this court; ſo that Bailie Robb has not inſtructed even the remote conſequential intereſt which he pretends to, and the libel falls neceſſarily to be diſmiſſed.

In the ſame way the pannel is intitled to ſay, that, in every particular of his oath, he is ſupported in the civil cauſe by every one witneſs who was examined on either ſide of the queſtion; and conſequently, that a proſecution againſt him for perjury is abſurd. There is at leaſt no evidence to the contrary; and it was the duty of the proſecutor, when he came to this court with an accuſation of ſo heinous a nature againſt the pannel, to ſhow, that there was *foundation for the action*, by exhibiting a full ſtate of the proceedings in the former cauſe, in order that it might appear that the witneſs was not ſupported in his teſtimony by the whole, or by any part of the other proof.

This alſo leads to a *third* objection, *viz.* That had the proceedings of the civil cauſe been before your Lordſhips, which it was the duty of the proſecutor to have tranſmitted, the pannel would from thence have ſhown, that in the material facts depoſed to by him, he is, in fact, ſupported by the teſtimony of other witneſſes, in ſome of them by three or four witneſſes; and in ſuch caſe, where there is a concurrence of two or more witneſſes to the ſame fact, if it be a fact which

Obect 3. In ſo far as ſupported by concurring witneſſes, charge of perjury not relevant.

which in its nature admits of any uncertainty, he denies that there can be a proſecution for perjury by the evidence of other witneſſes. It is unneceſſary to inquire how far a *ſingle witneſs* deponing to a fact, may not be convicted of perjury upon the evidence of other witneſſes, which is the caſe mentioned by Balfour; nor is it material to diſpute, whether even two witneſſes depoſing to a fact, which, in its own nature, admits of notoriety or certainty, for example, that a man is dead or alive, may not be convicted by a cloud of other witneſſes depoſing to the contrary. But what they do, with ſubmiſſion, contend, that in a fact, admitting in its nature of any doubt or uncertainty, it is impoſſible that two concurring witneſſes can be found guilty of perjury, though other witneſſes ſhould give a different account of the fact; becauſe the evidence of the one ſet of witneſſes is juſt as good as that of the other, and circumſtances may have happened to occaſion an innocent miſtake or miſapprehenſion, either on the one ſide or the other, though the judge muſt no doubt weigh every circumſtance in order to determine him which of the two contradictory teſtimonies he will incline to believe.

In this reſpect, there is a great difference between reprobating the teſtimony of a witneſs in the *initialia*, in which he ſtands ſingle, and proving perjury againſt him in the ſubſtantials, in which he may be ſupported by other witneſſes. Sir George Mackenzie ſays, "When "witneſſes depone with us in any private caſe, it was of old doubted, whether the depoſitions might be reprobated and themſelves "puniſhed for perjury by the depoſitions of other witneſſes; and of "late concluſions ſeem to be regularly allowed, 1*mo*, That a witneſs de- "poning *verba initialia* falſly, ſuch as of what age he is, whether he be "married, or where he dwells, *eo caſu*, he may be puniſhed for perjury "if he depone falſly; for theſe queſtions are proponed not only to the end "it may be known what age the witneſſes are of, but likewiſe to the end "it may be known whether the deponer be a perſon of ſuch veracity "as may be truſted, and that by theſe his veracity may be traced "and examined. 2*do*, That a witneſs may be convinced of per- "jury by writ. But, 3*tio*, Whether witneſſes may be convinced of "falſhood and perjury by the depoſition of other witneſſes, was "controverted

Criminals, tit. Perjury, § 5.

" controverted in the caſe of Balcanqual *contra* Rigg a miniſter; " and that he could not was urged; becauſe, if this were allowed, " *daretur progreſſus in infinitum*; for elſe, if two witneſſes deponing " that ſuch a thing were done, might be convinced of perjury by " other two or more witneſſes, theſe witneſſes might again be con- " vict by others, and thoſe by others *in infinitum.*" And upon theſe principles, he ſays, " The juſtices by interlocutor found, that wit- " neſſes could not be purſued for perjury upon the depoſition of o- " ther witneſſes, upon the day of 1667.

" But yet," ſays he, " It remains doubtful, whether one witneſs may " not be purſued for perjury upon the depoſition of others, *though* " *two cannot*, becauſe the joint depoſitions only make a full pro- " bation."

In like manner Lord Stair ſays, " Neither can probation be led a- " gainſt the teſtimony of *concurring witneſſes*, though reprobations are " competent againſt the initials of their teſtimonies; for therein " they are not *conteſtes.*" And the author of the late Inſtitute alſo ſays, " That the teſtimonies of two unexceptionable concurring wit- " neſſes cannot be reprobated, as to the *ſubſtantials* of the ſame, by " other witneſſes depoſing the contrary; becauſe at that rate there " could be no end."

Accordingly it does not appear, that, in any inſtance whatever, has a trial for perjury been allowed to proceed before your Lordſhips, where there was a concurrence of witneſſes to the ſame fact. On the contrary, in the above caſe mentioned by Sir George M'Kenzie, ſuch trial was expreſsly found to be irrelevant, and the ſame thing was in point determined in the caſe of Balcanqual *contra* Laurie and Turner, 6th July 1667, to be found in the books of Adjournal. The pannels were there charged with perjury, in regard that in a proceſs before the Court of Seſſion, they had upon oath given a falſe account of the viccarage-teinds of the pariſh of Strathmiglo, and a contradictory proof by witneſſes was offered to be adduced; but the court, agreeable to what is now argued, found that mean of proof irrelevant, and aſſoilzied the pannels.

The caſes of M'Killop in 1754, and of Kirkpatrick at the circuit of Dumfries, which were quoted in the pleading, are *toto cælo* different.

In both of theſe caſes the pannels ſtood ſingle, and were contradicted and clearly refuted by the whole other evidence; and the trials were brought after the civil action was concluded, and both of them too at the inſtance of his Majeſty's Advocate. In the preſent caſe the pannel does aver and ſay, that were the proceedings in the civil action before your Lordſhips, it would from thence appear, that his teſtimony not only ſtands uncontradicted, but that it is *ſupported and concurred in* by other evidence; and conſequently that he cannot be tried before your Lordſhips as having been guilty of perjury in ſaid action.

The proſecutor ſays, that this is a matter not *hujus loci*; for that he muſt bring theſe other witneſſes in exculpation, when the libel goes to the knowledge of the jury. But the pannel does with ſubmiſſion apprehend, that it is *hujus loci* to plead, as in the caſes above adduced, that he cannot at all be tried for perjury, becauſe, from the proceedings in the civil cauſe, which it was the duty of the proſecutor to lay before your Lordſhips as his charge, it appears that he is ſupported in the material facts by other witneſſes; and he has already ſhown, from authorities and deciſions, that no trial for perjury can in ſuch caſe proceed. This he apprehends he is intitled to plead, though theſe proceedings are not before your Lordſhips; becauſe it is the fault of the proſecutor that they are not here.

Objec. 4. wrong ſtatute libelled on.

A *fourth* objection, ſtated againſt this libel was, That the proſecutor had laid it upon a wrong act of parliament. It is laid upon the act 19th parliament 5. of Queen Mary, againſt bigamy; which act only contains an implied declaration of what were underſtood to be the pains of perjury at that time. But whatever may then have been the puniſhment of perjury, either by the common or ſtatute law of Scotland, there is a poſterior ſtatute, viz. the 47th act, 6th parliament of Queen Mary, expreſsly relative to that particular ſpecies of it committed by a witneſs on oath, which ſays, "That all ſik perſones in "time cuming be puniſhed," &c. The enactments of theſe two ſtatutes are different in many reſpects, which will occur upon compearing them; and it is expreſsly ſaid, that the ſubſequent ſtatute ſhall be the rule *in all time coming* for trying this ſpecies of perjury. It

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is remarkable too, that the ſtatute concludes with ſaying, that further puniſhment ſhall be inflicted *at the ſight and diſcretion of the Lords*, which ſeems to mean the court of ſeſſion, and to imply that the trial ſhould be in that court.

A ſtill more material objection occurs to the minor propoſition, which in fact does not charge the pannel with a crime, but only accuſes him of having emitted *falſehoods judicially on oath*. It does not ſay, that he emitted theſe falſehoods *wilfully*, or *knowing* them to be ſuch. No intention or knowledge, or purpoſe of telling falſehoods, is ſo much as hinted at in the libel; but merely the fact ſtated, that he did affirm falſehoods upon oath, which *per ſe* does not conſtitute a crime. Your Lordſhips know, that the intention or *animus* is the eſſence of all crimes; and therefore muſt, in every caſe, be libelled; but more eſpecially in the caſe of ſwearing falſely; becauſe nothing is more common than for witneſſes to ſwear falſely (*i. e.*) erroneouſly, from want of memory, from deception, and from fifty other cauſes, without having the leaſt intention ſo to do; and therefore, it is plain, that the crime of perjury does not conſiſt in ſwearing falſely, but in ſwearing falſely, with a corrupt and wilful intention. Sir George MacKenzie defines perjury to be "a lie affirmed judicially upon oath;" but, ſays he, becauſe it is not preſumable, that any perſon would both be ſo mean as "to lie, and ſo wicked as to call God to be a witneſs thereto; therefore, "lawyers have very juſtly delivered as a brocard, that perjury is not com-"mitted *without fraud*; *interpretatio facienda eſt, ut evitetur perjurium.*" Hawkins defines perjury at common law, to be "a *wilful* falſe oath, "by one who being lawfully required to depoſe the truth in any pro-"ceeding in a court of juſtice, ſwears abſolutely in a matter of ſome con-"ſequence to the point in queſtion, whether he be believed or not." In another place, he ſays, "The notion of perjury is confined to "ſuch public oaths only, as affirm or deny ſome matter of fact "contrary to the *knowledge* of the party." And, after reciting the act above mentioned of Queen Elizabeth, which is the ſtanding law upon which perjury is tried in England, ſays, that every indictment or action on the ſaid ſtatute muſt bear, that the defendant depoſed ſuch a matter *voluntarie et corrupte*. Theſe, and no other words, he ſays,

Object. 5. No crime libelled.

Tit. Perjury, p. 172

page 173.

p. 178.

ſays, muſt be uſed, not even expreſſions equivalent thereto; and for this he quotes a variety of precedents.

The anſwer made to this objection by the proſecutor was twofold; 1*mo*, That the technical word *perjury* was uſed; 2*do*, That the fact itſelf being libelled, the intention muſt be preſumed, unleſs the contrary is proved in defence.

With regard to the *firſt* of theſe anſwers, your Lordſhips will obſerve, that the libel does by no means charge perjury *per ſe*, as a known and technical term, implying the crime commonly known by that name. The word is indeed uſed; but it is expreſsly *qualified* by what follows in the libel. The pannel is charged as guilty, not of perjury ſimply and abſolutely, but of perjury *in ſo far as* a complaint having been preſented, *&c.* the ſaid Gabriel Halladay did emit a depoſition affirming falſehoods judicially upon oath. The relevancy therefore depends entirely upon the qualifying words; and as theſe words are not pretended to be technical, or to imply any criminal intention, it is clear, that the libel is not relevant. The caſe is juſt the ſame, as if a man was charged with *theft*, "in ſo far as he is in poſſeſſion of goods "which are not his property, but belong to another man;" or, as if a libel ſhould charge *forgery* of bank-notes, "in ſo far as the pannel "uttered notes which were forged." In neither of theſe caſes would the libel be relevant, though the technical terms *theft* and *forgery* are uſed; becauſe the *ſpecies facti*, by which the general charge is qualified, does not amount to a crime.

To the *ſecond* anſwer, it is replied, that the doctrine maintained by the proſecutor, is entirely contrary to every notion of criminal practice. It may be very true, that where a relevancy is libelled, and the fact proved, the intention is in moſt caſes preſumed, unleſs otherwiſe explained by contrary evidence; for example, if an indictment is relevantly laid for murder, and the proof comes out, that the pannel did actually commit the fact of putting a man to death, it may be preſumed, that he had the intention ſo to do, unleſs the contrary appears from the proof in exculpation. But ſtill the libel muſt be relevantly laid, and muſt ſet forth, that the pannel committed this fact with a *wilful and deliberate purpoſe*, otherways it cannot go to proof;

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for example, if it ſhould be libelled, " that the pannel was guilty of " taking away the lifeof another man," this would not berelevant; becauſe a man's life may very often be taken away innocently, and even lawfully. In the preſent caſe, it is not ſaid, that the pannel was guilty of perjury, but that he was guilty of doing a thing which is done every day, without the ſmalleſt criminal intention, *viz.* telling facts upon oath which are not true; and therefore, as there is no relevancy in this charge, it cannot poſſibly go to proof.

And indeed, when the particulars of the oath recited in the libel, from which this charge of ſwearing falſely is endeavoured to be made out, are narrowly examined, they are all of ſuch a nature, that, ſuppoſing them not to be true, yet it is much more probable that the pannel's affirmation of them may have proceeded from inattention, miſtake, or other cauſes, than from a deliberate purpoſe of telling falſehoods. For example, he over-hears a converſation which paſſed between Peattie and his wife in one houſe, while he himſelf was in another. From the liſt of witneſſes, it appears that the perſons by whom this converſation is meant to be diſproved, are Peattie himſelf and his wife. Very unexceptionable witneſſes truly! But let it be ſuppoſed, that the particulars of the converſation were diſproved by a hundred witneſſes. What then? Does it neceſſarily follow, that the pannel *knowingly* and *wilfully* gave a falſe account of this converſation? Or is it not rather to be preſumed, that, from the ſituation of the parties at the time, he has been deceived, or has not heard diſtinctly? At the ſame time, this happens to be one of the facts in which he is ſupported by other concurring witneſſes.

In like manner the article of Lieutenant Stewart, which it would ſeem is only to be diſproved by Lieutenant Stewart himſelf and his wife, does not conclude any intention to ſwear falſely; on the contrary, the witneſs ſeems to ſay he did not know Lieutenant Stewart by his voice, and only ſaw him at a diſtance coming out of the houſe after the converſation happened; ſo that the converſation may have been between other perſons; and from the diſtance of the place where he ſtood, he may have taken another man for Lieutenant Stewart. The pannel does not mean to ſay, whether this was the fact or not; for

he is not now ſpeaking to the fact, but to the relevancy of the libel as it ſtands.

The next article relates alſo to a converſation between two perſons therein named, *viz.* Bailie Brown and Robert Peattie. From the nature of the thing, words paſſing in converſation may have been miſapprehended; at the ſame time it is ridiculous in the proſecutor to imagine, that this converſation can be redargued by Brown and Peattie themſelves, the perſons accuſed, and the only two witneſſes propoſed to be adduced for that purpoſe.

The *fourth* and laſt articles are of the ſame ſtamp, with this difference, that there is only one perſon, *viz.* Walter Thomſon, an inhabile witneſs, by whom it can be contradicted.

Objection 6. Perſons not deſcribed.

A *ſixth* objection to the libel ariſes from this, That the names of a variety of perſons, ſuch as Baillie Brown, Walter Thomſon, Robert Peattie, Lieutenant Stewart, &c. are mentioned in it; but who theſe people are, is not ſaid; for example, the libel ſets forth a converſation mentioned in the pannel's oath, between Lieutenant Stewart and Mrs Peattie, and adds theſe words: "Although no ſuch "converſation ever happened between Lieutenant Stewart and Mrs "Peattie; and, although at the time depoſed to the ſaid Lieutenant "Stewart was not in the borough of Weſter Anſtruther." No deſcription is here given of the Lieutenant Stewart that is meant. It may be true, that one Lieutenant Stewart was in Weſter Anſtruther at the time, and that another Lieutenant Stewart was not; and in fact, the pannel is informed that there were two Lieutenant Stewarts who were in uſe to be in the borough at that time.

Laſt Objection. Impropriety of bringing a trial in this court.

Laſtly, The pannel ſubmits to your Lordſhips, That ſuppoſing there had been ground for this proſecution, it was ſomewhat hard that he ſhould have been dragged to the bar of the criminal court, when the queſtion could with more propriety have been tried in an incidental manner before the court of ſeſſion, where the civil action in which he was examined was, and ſtill is depending; and where the judges, from their knowlege of the whole circumſtances of that cauſe, muſt be much better enabled to determine how far he has been guilty of the crime charged than any jury can poſſibly

poſſibly be, unleſs the whole proof which was brought in the civil cauſe ſhall again be led before the jury, which will not be practicable. The reaſon of ſerving him with a criminal indictment before your Lordſhips, ſeems to have been two-fold. In the *firſt* place, To put a public affront upon him, and ruin him and his family, whoſe ſubſiſtence depends on the preſervation of his character, and the opinion which his fellow citizens entertain of his fitneſs to act in the office which he now bears. 2*do*, To affect his evidence in the opinion of the judges of another court, who will no doubt be informed that he is now ſtanding trial for perjury, and thereby to prejudge or influence the civil queſtion.

As to this laſt, the proſecutor diſclaimed any ſuch intention, and declared his willingneſs that the trial ſhould be ſtaid till the civil proceſs was concluded. But the pannel, who has no connection or concern with that civil proceſs, and is indifferent what effect his condemnation or acquittal may have upon it, does by no means deſire any ſuch continuation. He apprehends, your Lordſhips cannot have a doubt of diſmiſſing this libel, not only as brought without a title, but as irrelevant in itſelf, and highly injurious and oppreſſive; and even, if it ſhould go to proof, he is extremely confident of being acquitted by his country upon evidence; for which reaſon, he will be pardoned, if he gives no conſent to the offer made by this nominal proſecutor, leaving to your Lordſhips to do therein as you ſhall think proper.

In reſpect whereof, &c.

ILAY CAMPBELL.